No. 84-6811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification Center.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. To make out a prima facie case under the Equal Protection Clause of the Fourteenth Amendment, must a condemned inmate alleging racial discrimination in a State's application of its capital sentencing statutes present statistical evidence "so strong as to permit no inference other than that the results are a product of racially discriminatory intent or purpose?"

2. Is proof of intent to discriminate a necessary element of an Eighth Amendment claim that a State has applied its capital statutes in an arbitrary, capricious and unequal manner?

3. Must a condemned inmate present specific evidence that he was personally discriminated against in order to obtain either Eighth or Fourteenth Amendment relief on the grounds that he was

sentenced to die under a statute administered in an arbitrary or racially discriminatory manner?

4. Does a proven racial disparity in the imposition of capital sentences, reflecting a systematic bias against black defendants and those whose victims are white, offend the Eighth or Fourteenth Amendments irrespective of its magnitude?

5. Does an average 20-point racial disparity in death-sentencing rates among that class of cases in which a death sentence is a serious possibility so undermine the evenhandedness of a capital sentencing system as to violate the Eighth or Fourteenth Amendment rights of a death-sentenced black inmate?

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 753 F.2d 877 (11th Cir. 1985)(en banc). The opinion of the United States District Court for the Northern District of Georgia is reported at 580 F. Supp. 338 (N.D. Ga.

1984).

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1985. A timely motion for rehearing was denied on March 26, 1985. The Court granted certiorari on July 7, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and the Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner Warren McCleskey is a young black man who was tried in the Superior Court of Fulton County, Georgia, for the murder of a white police officer, Frank Schlatt. The homicide occurred on May 13, 1978 during an armed robbery of the Dixie Furniture

Store in Atlanta. In a statement to police, petitioner admitted that he had been present during the robbery, but he denied that he had fired the shot that killed Officer Schlatt. (Tr.T. 453).[1]

Petitioner was tried by a jury comprised of eleven whites and one black. (Fed.Tr.1316). The State's case rested principally upon certain disputed forensic and other circumstantial evidence suggesting that petitioner may have fired the murder weapon, and upon

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[1] Each reference to the trial transcript will be indicated by the abbreviation "Tr.T," and to the federal habeas corpus transcript, by the abbreviation "Fed.Tr."

References to the Joint Appendix will be indicated by the abbreviation "J.A." and to the Supplemental Exhibits, by "S.E." Petitioner's exhibits submitted to the District Court during the federal hearing were identified throughout the proceedings by the initials of the witness during whose testimony they were introduced, followed by an exhibit number. For example, the first exhibit introduced during the testimony of Professor David Baldus was designated "DB 1."

purported confessions made to a co-defendant and to a cellmate, Offie Evans. [2]

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[2] The co-defendant, Ben Wright, had a possible personal motive to shift responsibility from himself to petitioner. Inmate Evans testified without any apparent self-interest that petitioner had boasted to him in the cell about shooting Officer Schlatt. However, the District Court later found that Evans had concealed from petitioner's jury a detective's promise of favorable treatment concerning pending federal charges. Holding that this promise was "within the scope of Giglio [v. United States, 405 U.S. 150 (1972)]," (J.A.188), the District Court granted petitioner habeas corpus relief: "[G]iven the circumstantial nature of the evidence that McCleskey was the triggerman who killed Officer Schlatt and the damaging nature of Evans' testimony as to this issue and the issue of malice . . . the jury may reasonably have reached a different verdict on the charge of malice murder had the promise of favorable treatment been disclosed." (J.A.190).

The Court of Appeals reversed, holding that the detective's promises to witness Evans were insufficiently substantial to require full disclosure under Giglio, and that any errors in concealing the promises were harmless. (J.A.242-44). Five judges dissented, contending that Giglio had plainly been violated; four of the five also believed that the concealed promise was not

The jury convicted petitioner on all charges. Following the penalty phase, it returned a verdict finding two aggravating circumstances [3] and recommending a sentence of death. On October 12, 1978, the Superior Court imposed a death sentence for murder and life sentences for armed robbery. (J.A.112). After his convictions and sentences had been affirmed on direct appeal, McClesky v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891 (1980), petitioner filed a petition for habeas corpus in the Superior Court of Butts County, alleging, inter alia,

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harmless. (J.A.287-89) (Godbold, Ch.J., dissenting in part); id. at 286; (Kravitch, J., concurring).

[3] The jury found that the murder had been committed during an armed robbery, former Ga. Code Ann. § 27-2534.1(b)(2)(current version O.C.G.A. § 17-10-30(b)(2)), and that it had been committed against a police officer. Former Ga. Code Ann. § 27-2534.1(b)(8)(current version O.C.G.A. § 17-10-30(b)(8)).

that he had been condemned pursuant to capital statutes which were being "applied arbitrarily, capriciously and whimsically" in violation of the Eighth Amendment (State Habeas Petition, ¶ 10), and in a "pattern . . . to discriminate intentionally and purposefully on grounds of race," in violation of the Equal Protection Clause. (Id. ¶ 11). The Superior Court denied relief on April 8, 1981.

After unsuccessfully seeking review from the Supreme Court of Georgia and this Court, see McCleskey v. Zant, 454 U.S. 1093 (1981)(denying certiorari), petitioner filed a federal habeas corpus petition reasserting his claims of systemic racial discrimination and arbitrariness. (Fed. Habeas Pet. ¶¶ 45-50; 51-53). The District Court held an evidentiary hearing on these claims in August of 1983.

The evidence presented by petitioner at the federal hearing is integrally related to the issues now on certiorari. In the next section, we will summarize that evidence briefly; fuller discussion will be included with the legal arguments as it becomes relevant.[4]

B. Petitioner's Evidence of Racial Discrimination: The Baldus Studies

Petitioner's principal witness at the federal habeas hearing was Professor David C. Baldus, one of the nation's leading experts on the legal

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[4] Discussion of the research design of the Baldus studies appears at pp. 50-55 infra. Statistical methods used by Professor Baldus and his colleagues are described at pp. 66-71. The principal findings are reviewed at pp. 80-89.

A more detailed description of the research methodology of the Baldus studies -- including study design, questionnaire construction, data sources, data collection methods, and methods of statistical analysis -- can be found in Appendix E to the Petition for Certiorari, McCleskey v. Kemp, No. 84-6811.

use of statistical evidence. [5] Professor Baldus testified concerning two meticulous and comprehensive studies he had undertaken with Dr. George Woodworth [6] and Professor Charles

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[5] Professor Baldus is the co-author of an authoritative text in the field, D.Baldus & J. Cole, Statistical Proof of Discrimination (1980), as well as a number of law review articles relevant to his testimony in this case. Baldus, Pulaski, Woodworth & Kyle, Identifying Comparatively Excessive Sentences of Death, 33 Stan. L. Rev. 601 (1980); Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. Law & Criminology 661 (1983); Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia, 18 U.C. Davis L. Rev. 1374 (1985); Baldus, Pulaski & Woodworth, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 Stetson L. Rev. 133 (1986).

[6] Dr. Woodworth is Associate Professor of Statistics at the University of Iowa and the founder of Iowa's Statistical Consulting Center. (Fed.Tr.1203-04). He has consulted on statistical techniques for over eighty empirical studies (id. 1203-04) and has taught and written widely on statistical issues. (GW 1).

Pulaski.[7] Professor Baldus explained that he had undertaken the studies to examine Georgia's capital sentencing experience under its post-Furman statutes. The studies drew from a remarkable variety of official records on Georgia defendants convicted of murder and voluntary manslaughter, to which Professor Baldus obtained access through the cooperation of the Georgia Supreme Court, the Georgia Board of

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[7] Professor Charles A. Pulaski, Jr., is Professor of Law at Arizona State University College of Law, specializing in criminal procedure. Professor Pulaski did not testify during the federal hearing.

Petitioner also presented expert testimony from Dr. Richard A. Berk, Professor of Sociology and Director of the Social Process Research Institute at the University of California at Santa Barbara, and a nationally prominent expert on research methodology, especially in the area of criminal justice research. He was a member of the National Academy of Sciences' Committee on Sentencing Research. Dr. Berk gave testimony evaluating the appropriateness of Baldus' method and the significance of his findings.

Pardons and Paroles, and other state agencies. These records included not only trial transcripts and appellate briefs but also detailed parole board records, prison files, police reports and other official documents. (S.E. 43).

Using a carefully tailored questionnaire, Professor Baldus gathered over five hundred items of information on each case concerning the defendant, the victim, the crime, the aggravating and mitigating circumstances, and the strength of the evidence. In addition, the Baldus questionnaire required researchers to prepare a narrative summary to capture individual features of each case. The full questionnaire appears as DB 38 in the Supplemental Exhibits. (S.E. 1-42). Employing generally accepted data collection methods at each step, Professor Baldus cross-checked the accuracy of the data

both manually and by computer-aided systems. (Fed.Tr.585-616).

Professor Baldus found that during the 1973-1979 period, 2484 murders and non-negligent manslaughters occurred in the State of Georgia. Approximately 1665 of those involved black defendants; 819 involved white defendants. Blacks were the victims of homicides in approximately 61 percent of the cases, whites in 39 percent. When Professor Baldus began to examine the State's subsequent charging and sentencing patterns, however, he found that the racial proportions were heavily inverted. Among the 128 cases in which a death sentence was imposed, 108 or 87% involved white victims. As exhibit DB 62 demonstrates, white victim cases were nearly eleven times more likely to receive a sentence of death than were black victim cases. (S.E. 46). When the

cases were further subdivided by race of defendant, Professor Baldus discovered that 22 percent of black defendants in Georgia who murdered whites were sentenced to death, while scarcely 3 percent of white defendants who murdered blacks faced a capital sentence. (S.E. 47).

These unexplained racial disparities prompted Professors Baldus and Woodworth to undertake an exhaustive statistical inquiry. They first defined hundreds of variables, each capturing a single feature of the cases.[8] Using various statistical models, each comprised of selected groups of different variables (see Fed. Tr. 689-705), Baldus and Woodworth tested whether other

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[8] For example, one variable might be defined to reflect whether a case was characterized by the presence or absence of a statutory aggravating circumstance, such as the murder of a police victim. (See Fed.Tr.617-22).

characteristics of Georgia homicide cases might suffice to explain the racial disparities they had observed. Through the use of multiple regression analysis, Baldus and Woodworth were able to measure the independent impact of the racial factors while simultaneously taking into account or controlling for more than two hundred aggravating and mitigating factors, strength of evidence factors, and other legitimate sentencing considerations. (See, e.g., S.E. 51).

Professors Baldus and Woodworth subjected the data to a wide variety of statistical procedures, including cross-tabular comparisons, weighted and unweighted least-squares regressions, logistic regressions, index methods, cohort studies and other appropriate scientific techniques. Yet regardless of which of these analytical tools Baldus and Woodworth brought to bear,

race held firm as a prominent determiner of life or death. Race proved no less significant in determining the likelihood of a death sentence than aggravating circumstances such as whether the defendant had a prior murder conviction or whether he was the prime mover in the homicide. (S.E. 50). Indeed, Professor Baldus testified that his best statistical model, which "captured the essence of [the Georgia] . . . system" (Fed.Tr.808), revealed that after taking into account most legitimate reasons for sentencing distinctions, the odds of receiving a death sentence were still more than 4.3 times greater for those whose victims were white than for those whose victims were black. (Fed.Tr. 818; DB 82). Focusing directly on petitioner's case, Baldus and his colleagues estimated that for homicide cases "at Mr. McCleskey's

level of aggravation the average white victim case has approximately a twenty [20] percentage point higher risk of receiving a death sentence than a similarly situated black victim case." (Id. 1740).[9] Professor Baldus also testified that black defendants whose victims were white were significantly more likely to receive death sentences than were white defendants, especially among cases of the general nature of

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[9] These figures represent a twenty percentage point, not a twenty percent, increase in the likelihood of death. Among those cases where the average death-sentencing rate is .24 or 24-in-100, the white-victim rate would be approximately .34 or 34-in-100, the black-victim rate, only .14, or 14-in-100. This means that the sentencing rate in white victim cases would be over twice as high (.34 vs. .14) as in black victim cases. Thus, on the average, among every 34 Georgia defendants sentenced to death at this level of aggravation for the murders of whites, 20 would likely not have received a death sentence had their victims been black.

petitioner's. (Fed.Tr. 863-64).

Professor Baldus demonstrated that this "dual system" of capital sentencing was fully at work in Fulton County where petitioner had been tried and sentenced to death. Not only did county statistical patterns replicate the statewide trends, but several non-statistical comparisons of Fulton County cases further emphasized the importance of race. For example, among those 17 defendants who had been charged with homicides of Fulton County police officers between 1973 and 1980, only one defendant other than petitioner had even received a penalty trial. In that case, where the victim was black, a life sentence was imposed. (Fed.Tr.1050-62).

The State of Georgia produced little affirmative evidence to rebut petitioner's case. It offered no alternative model that might have

reduced or eliminated the racial variables. (Fed. Tr. 1609). It did not even propose, much less test the effect of, additional factors concerning Georgia crimes, defendants or victims, admitting that it did not know whether such factors "would have any effect or not." (Id. 1569). The State expressly declined Professor Baldus's offer, during the hearing, to employ statistical procedures of the State's choice in order to calculate the effect of any factors the State might choose to designate and to see whether the racial effects might be eliminated. [10]

Instead, the State simply attacked

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[10] The District Court did accept Professor Baldus's invitation and designated a statistical model it believed would most accurately capture the forces at work in Georgia's capital sentencing system. (Fed. Tr. 810; 1426; 1475-76; 1800-03; Court's Exhibit 1). After analyzing this model, Professor Baldus reported that it did nothing to diminish the racial disparities. (See R. 731-52).

the integrity of Professor Baldus's data sources (see Fed. Tr. 1380-1447), its own official records. It also presented one hypothesis, that the apparent racial disparities could be explained by the generally more aggravated nature of white victim cases. The State's principal expert never tested that hypothesis by any accepted statistical techniques (id. 1760-61), although he admitted that such a test "would . . .[have been] desirable." (Id. 1613). Professors Baldus and Woodworth did test the hypothesis and testified conclusively on rebuttal that it could not explain the racial disparities. (Fed.Tr.1290-97; 1729-32; GW 5-8).

C. The Decisions Below

The District Court rejected petitioner's claims. It faulted petitioner's extraordinary data sources because they had "not capture[d] every

nuance of every issue." (J.A.136). The extensive Parole Board records, the court complained, "present a retrospective view of the facts and circumstances . . . after all investigation is completed, after all pretrial preparation is made." (J.A.146). Since such files, the court reasoned, did not measure the precise quanta of information available to each decision maker -- police, prosecutor, judge, jury -- at the exact moment when different decisions about the case were made, "the data base . . . is substantially flawed." (Id.) As a related matter, the District Court insisted that all of Professor Baldus's statistical models of the Georgia system --- even those employing more than 230 separate variables -- were "insufficiently predictive" since they did not include every conceivable

variable and could not predict every case outcome. (J.A.147).

The District Court ended its opinion by rejecting the legal utility of such statistical methods altogether:

> [M]ultivariate analysis is ill suited to provide the court with circumstantial evidence of the presence of discrimination, and it is incapable of providing the court with measures of qualitative difference in treatment which are necessary to a finding that a prima facie case has been established . . . To the extent that McCleskey contends that he was denied . . . equal protection of the law, his methods fail to contribute anything of value to his cause.

(J.A.168-69)(italics omitted).

The majority of the Court of Appeals chose not to rest its decision on these findings by the District Court; instead it expressly "assum[ed] the validity of the research" and "that it proves what it claims to prove." (J.A.246). Yet the Court proceeded to announce novel standards of proof that foreclose any

meaningful review of racial claims like petitioner's. As its baseline, the Court held that statistical proof of racial disparities must be "sufficient to compel a conclusion that it results from discriminatory intent and purpose." (J.A.259) (emphasis added). "[S]tatistical evidence of racially disproportionate impact [must be] . . . so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." (J.A.250). The Court also announced that even unquestioned proof of racially discriminatory sentencing results would not suffice to make out an Equal Protection Clause violation unless the racial disparities were of sufficient magnitude: "The key to the problem lies in the principle that the proof, no matter how strong, of some disparity is alone insufficient."

(J.A.259). "In any discretionary system, some imprecision must be tolerated," the Court stated, and petitioner's proven racial disparities were "simply insufficient to support a ruling . . . that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious." (J.A.268). Finally, the majority held that no Eighth Amendment challenge based upon race could succeed absent similar proof of purposeful State conduct. Although "cruel and unusual punishment cases do not normally focus on the intent of the government actor . . . where racial discrimination is claimed . . . then purpose, intent and motive are a natural component of the proof" (J.A.257) and "proof of a disparate impact alone is insufficient . . . unless . . . it compels a conclusion that . . . race is

intentionally being used as a factor in sentencing." (J.A.258).

SUMMARY OF ARGUMENT

The principal questions before the Court on certiorari involve intermediate issues of evidence and proof. Fundamental constitutional values are nonetheless at the heart of this appeal. Our primary submission is that the lower courts, by their treatment of petitioner's evidence, have effectively placed claims of racial discrimination in the death penalty -- no matter how thoroughly proven -- beyond effective judicial review. To appreciate the impact of the lower court's holding, it is necessary at the outset to recall the constitutional values at stake.

This country has, for several decades, been engaged in a profound national struggle to rid its public life of the lingering influence of official,

state-sanctioned racial discrimination. The Court has been especially vigilant to prevent racial bias from weighing in the scales of criminal justice. See, e.g., Batson v. Kentucky, __U.S.__, 90 L.Ed.2d 69 (1986); Turner v. Murray, __U.S.__, 90 L.Ed.2d 27, 35 (1986); Vasquez v. Hillery, __U.S.__, 88 L.Ed.2d 598 (1986). A commitment against racial discrimination was among the concerns that led the Court to scrutinize long-entrenched capital sentencing practices and to strike down statutes that permitted arbitrary or discriminatory enforcement of the death penalty. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972).

In 1976, reviewing Georgia's then new post-Furman capital statutes, the Court declined to assume that the revised sentencing procedures would inevitably fail in their purpose to

eliminate "the arbitrariness and capriciousness condemned by Furman." Gregg v. Georgia, 428 U.S. 153, 198 (1976)(opinion of Stewart, Powell & Stevens, J.J.). Accord, id. at 220-26 (opinion of White, J.); see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980). It was appropriate at that time for the Court to clothe Georgia's new statutes with a strong presumption of constitutionality -- to assume, "[a]bsent facts to the contrary," Gregg v. Georgia, 428 U.S. at 225 (opinion of White, J.), that its statutes would be administered constitutionally: to reject "the naked assertion that the effort is bound to fail." Id. at 222. Yet the presumption extended to Georgia in 1976 was not -- and under the Constitution could never have been -- an irrevocable license to carry out capital punishment arbitrarily and discriminatorily in

practice.

Petitioner McCleskey has now presented comprehensive evidence to the lower courts that Georgia's post-Furman experiment has failed, and that its capital sentencing system continues to be haunted by widespread and substantial racial bias.

Faced with this overwhelming evidence, the Court of Appeals took a wrong turn. It accorded Georgia's death-sentencing statutes what amounts to an irrebuttable presumption of validity, one no capital defendant could ever overcome. It did so through a series of rulings that "placed on defendants a crippling burden of proof." Batson v. Kentucky, 90 L.Ed.2d at 85. Henceforth, a capital defendant, rather than proving a prima facie case of discrimination by demonstrating the presence of substantial racial

disparities within a system "susceptible of abuse" -- thereby shifting the burden of explanation to the State, see, e.g., Castaneda v. Partida, 430 U.S. 482, 494-495 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976); Batson v. Kentucky, supra -- must present proof so strong that it "permits no inference other than . . . racially discriminatory intent." No room is left in this formulation for proof by ordinary fact-finding processes. Instead, a capital defendant must anticipate and exclude at the outset "every possible factor that might make a difference between crimes and defendants, exclusive of race." (J.A.261).

This new standard for proof of racial discrimination has no precedent in the Court's teachings under the Equal Protection Clause; it is contrary to everything stated or implied in

Batson v. Kentucky, supra; Bazemore v. Friday, __U.S.__, 106 S.Ct. 3000 (1986); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and a host of the Court's decisions expounding the principle of a prima facie case.

Compounding the Court of Appeals' new standard is the burden it imposed upon statistical modes of proof, which virtually forecloses any demonstration of discriminatory capital sentencing by means of scientific evidence. To be sufficient, a statistical case must address not only the recognized major sentencing determinants, but also a host of hypothetical factors, conjectured by the Court, whose systematic relation to demonstrated racial disparities is dubious to say the least. (See J.A.271). This cannot be the law, unless there is to be a "death penalty exception" to the

Equal Protection Clause. Just last Term, the Court unanimously held that such a restrictive judicial approach to statistical evidence was unacceptable error. Bazemore v. Friday, 106 S.Ct. at 3009. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981).

The Court of Appeals also concluded that even proven, persistent racial disparities in capital sentencing are constitutionally irrelevant unless their magnitude is great. This holding strays far from the Constitution and the record. The Equal Protection Clause protects individuals against a little state-sanctioned racial discrimination as well as a lot; the law does not permit a State to use the death penalty infrequently, or discriminate when it does, and defend by saying that this discrimination is rare. Only last Term,

in Papasan v. Allain, __U.S.__, 106 S.Ct. 2932 (1986), the Court expressly declined to apply "some sort of threshold level of effect . . . before the Equal Protection Clause's strictures become binding."

In any event, the Court of Appeals plainly misconceived the facts as much as the law on this issue. As we will show, one central flaw pervading its decision was a serious misapprehension of the degree to which race played a part in Georgia's capital sentencing system from 1973 through 1979.

Finally, the court announced that, henceforth, in a capital case, proof of "purposeful discrimination will be a necessary component of any Eighth Amendment claim alleging racial discrimination." Such a rule contradicts both precedent and principle. Under the Eighth Amendment,

this Court has held that it is the State's obligation "to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The federal task in reviewing the administration of those laws "is not restricted to an effort to divine what motives impelled the[] death penalties," Furman v. Georgia, 408 U.S. at 253 (Douglas, J., concurring), but, having "put to one side" the issue of intentional discrimination, id. at 310 (Stewart, J., concurring), to discern whether death sentences are "be[ing] . . . wantonly and . . . freakishly imposed." Id. at 312.

Reduced to its essence, petitioner's submission to the Court is a simple one. Evidence of racial discrimination that would amply suffice if the stakes were a

job promotion, or the selection of a jury, should not be disregarded when the stakes are life and death. Methods of proof and fact-finding accepted as necessary in every other area of law should not be jettisoned in this one.

I.

RACE IS AN INVIDIOUS AND UNCONSTITUTIONAL CONSIDERATION IN CAPITAL SENTENCING PROCEEDINGS

A. The Equal Protection Clause Of The Fourteenth Amendment Forbids Racial Discrimination In The Administration Of Criminal Statutes

In the past century, few judicial responsibilities have laid greater claim on the moral and intellectual energies of the Court than "the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. at 239. The Court has striven to eliminate all forms of state-sanctioned discrimination, "whether accomplished ingeniously or ingenuously." Smith v. Texas, 311 U.S.

128, 132 (1940). It has forbidden discrimination required by statute, see, e.g., Brown v. Board of Education, 346 U.S. 483 (1954); Nixon v. Herndon, 273 U.S. 536 (1927), and has not hesitated to "look beyond the face of . . . [a] statute . . . where the procedures implementing a neutral statute operate . . . on racial grounds." Batson v. Kentucky, 90 L.Ed.2d at 82; Turner v. Fouche, 396 U.S. 346 (1970); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

The Court has repeatedly emphasized that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." Hunter v. Erickson, 393 U.S. 385, 391 (1969). In the area of criminal justice, where racial discrimination "strikes at the fundamental values of our judicial system and our society as a whole," Rose

v. Mitchell, 443 U.S. 545, 556 (1979), the Court has "consistently" articulated a "strong policy . . . of combating racial discrimination." Id. at 558.

One of the most obvious forms that such discrimination can take in the criminal law is a systematically unequal treatment of defendants based upon their race. See McLaughlin v. Florida, 379 U.S. 184, 190 n.8 (1964), citing Strauder v. West Virginia, 100 U.S. 303, 306-08 (1880); Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (No. 6546)(C.C.D.Cal. 1879). Certainly, among the evils that ultimately prompted the enactment of the Fourteenth Amendment and cognate post-Civil War federal legislation were state criminal statutes, including the infamous Black Codes, which prescribed harsher penalties for black persons than for whites. See General Building Contractors Ass'n., Inc. v.

Pennsylvania, 458 U.S. 375, 386-87 (1982).[11] In this case, Professor Baldus has reported that the race of the defendant -- especially when the defendant is black and the victim is white -- influences Georgia's capital sentencing process. The State of Georgia has disputed the truth of this claim, but has offered no constitutional defense if the claim is true. Georgia has never articulated, or even

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[11] The Court has accordingly insisted "that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' and, if they are ever to be upheld . . . be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979); cf. McLaughlin v. Florida, 379 U.S. at 198 ("I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense")(Stewart, J., concurring).

suggested, any "permissible state interest" that would justify the disproportionate infliction of capital punishment in a discriminatory fashion against black defendants.

Nor has Georgia claimed any constitutional warrant to execute murderers of white citizens at a greater rate than murderers of black citizens. The history of the Equal Protection Clause establishes that race-of-victim discrimination was a major concern of its Framers, just as Professor Baldus has now found that it is a major feature of Georgia's administration of the death penalty. Following the Civil War and immediately preceding the enactment of the Fourteenth Amendment, Southern authorities not only enacted statutes that treated crimes committed against black victims more leniently, but frequently declined even to prosecute

persons who committed criminal acts against blacks. When prosecutions did occur, authorities often acquitted or imposed disproportionately light sentences on those guilty of crimes against black persons. [12]

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[12] See, e.g., Report of the Joint Committee on Reconstruction, at the First Session, Thirty-Ninth Congress, Part II, at 25 (1866)(testimony of George Tucker, commonwealth attorney)(The southern people "have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea."); id. at 209 (testimony of Lt. Col Dexter Clapp)("Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, ... I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons."); id. at 213 (testimony of Lt. Col. J. Campbell); id., Part III, at 141 (testimony of Brevet M.J. Gen. Wagner Swayne)("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung [sic] or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me."); id., Part IV, at 76-76 (testimony of Maj. Gen. George Custer).

The congressional hearings and debates that led to enactment of the Fourteenth Amendment are replete with references to this pervasive race-of-victim discrimination; the Amendment and the enforcing legislation were intended, in substantial part, to stop it. As the Court recently concluded in Briscoe v. Lahue, 460 U.S. 325, 338 (1983), "[i]t is clear from the legislative debates that, in the view of the . . . sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished." See discussion in Petition for Certiorari, McCleskey v. Zant, No. 84-6811, at 5-7.

Even without reference to the Amendment's history, race-of-victim sentencing disparities violate long-recognized equal protection principles applicable to all forms of state action.

The Court has often held that whenever either "fundamental rights" or "suspect classifications" are involved, state action "may be justified only by a 'compelling state interest' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973); see also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

Discrimination by the race of victim not only implicates a capital defendant's fundamental right to life, cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), but employs the paradigmatic suspect classification, that of race. In McLaughlin v. Florida, supra, the Court examined a criminal statute which singled out for separate prosecution any black man who habitually occupied a

room at night with a white woman (or vice versa) without being married. The statute, in essence, prosecuted only those of one race whose cohabiting "victims" were of the other race. Finding no rational justification for this race-based incidence of the law, the Court struck down the statute.

The discrimination proven in the present case cannot be defended under any level of Fourteenth Amendment scrutiny. Systematically treating killers of white victims more harshly than killers of black victims can have no constitutional justification. [13] This

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13 The Court identified in Gregg v. Georgia, 428 U.S. at 183-84 (1976), at least two "legitimate governmental objectives" for the death penalty--retribution and deterrence. The Court noted that the death penalty serves a retributive purpose as an "expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183. The race of the victim obviously has no place as a factor in society's expression of moral outrage. Similarly, if the death penalty is meant to deter

would set the seal of the state upon the proposition that the lives of white people are more highly valued than those of black people -- either an "assertion of [the] . . . inferiority" of blacks, Strauder v. West Virginia, 100 U.S. at 308, or an irrational exercise of governmental power in its most extreme form.

B. The Eighth Amendment Prohibits Racial Bias In Capital Sentencing

Petitioner McCleskey has invoked the protection of a second constitutional principle, drawn from the Eighth Amendment. One clear concern of both the concurring and dissenting Justices in Furman v. Georgia, 408 U.S. 238 (1972), was the possible discriminatory application of the death penalty at that time. Justice Douglas concluded that

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capital crime, it ought to deter such crime equally whether inflicted against black or against white citizens.

the capital statutes before him were "pregnant with discrimination," 408 U.S. at 257, and thus ran directly counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." Id. at 255. Justice Stewart lamented that "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race."[14] These observations illuminate the holding of Furman, reaffirmed by the Court in Gregg and subsequent cases, that the death penalty may "not be imposed under sentencing procedures that create[] a substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner." Gregg

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[14] See id. at 364-66 (Marshall, J., concurring); cf. id. at 389 n.12 (Burger, C.J., dissenting); id. at 449-50 (Powell, Jr., dissenting).

v. Georgia, 428 U.S. at 188; Godfrey v. Georgia, 446 U.S. at 428; Zant v. Stephens, 456 U.S. 410, 413 (1982)(per curiam).

The Court itself suggested in Zant v. Stephens, 462 U.S. 862, 885 (1983), that if "Georgia attached the 'aggravating'' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant . . . due process of law would require that the jury's decision to impose death be set aside." This Eighth Amendment principle tracks the general constitutional rule that, where fundamental rights are at stake, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155. Legislative classifications that are unrelated to

any valid purpose of a statute are arbitrary and violative of the Due Process Clause. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). A legislative decision to inflict the uniquely harsh penalty of death along the lines of such an irrational classification would be still more arbitrary under the heightened Eighth Amendment standards of Furman. Cf. Gardner v. Florida, 430 U.S. 349, 357-58, 361 (1977)(plurality opinion); id. at 362-64 (opinion of White, J.). And nothing could be more arbitrary within the meaning of the Eighth Amendment than a reliance upon race in determining who should live and who should die.

II.

THE COURT OF APPEALS FASHIONED UNPRECEDENTED STANDARDS OF PROOF WHICH FORECLOSE ALL MEANINGFUL REVIEW OF RACIAL DISCRIMINATION IN CAPITAL SENTENCING PROCEEDINGS

The crucial errors of the Court of Appeals involve the "crippling burden of proof" it placed upon petitioner and any future inmate who would seek the protections of the Federal Constitution against racial discrimination in capital sentencing. "[E]qual protection to all," the Court long ago observed, "must be given -- not merely promised." Smith v. Texas, 311 U.S. at 130. The opinion below was all promise, no give. It held, in effect: You can escape being judged by the color of your skin, and by that of your victim, if (but only if) you can survey and capture every ineffable quality of every potentially capital case, and if you then meet standards for statistical analysis that

are elsewhere not demanded and nowhere susceptible of attainment.

Judged by these standards, the research of Professor Baldus--described by Dr. Richard Berk as "far and away the most complete and thorough analysis of sentencing that's ever been done" (Fed.Tr.1766) -- is simply not good enough. Nor would any future studies be, absent evidence that apparently must "exclud[e] every possible factor that might make a difference between crimes and defendants, exclusive of race." (J.A.261). As we shall demonstrate in the following subsections, these manifestly are <u>not</u> appropriate legal standards of proof. They depart radically from the settled teachings of the Court. They have no justification in policy or legal principle, and they trivialize the importance of Professor

Baldus's real and powerful racial findings.

A. The Court of Appeals Ignored This Court's Decisions Delineating A Party's Prima Facie Burden Of Proof Under The Equal Protection Clause

(i) The Controlling Precedents

In Batson v. Kentucky, the Court recently outlined the appropriate order of proof under the Equal Protection Clause. "[I]n any equal protection case, 'the burden is, of course,' on the defendant. . . 'to prove the existence of purposeful discrimination.' Whitus v. Georgia, 385 U.S. [545], at 550 [1967] ..." 90 L.Ed. 2d at 85. "[The defendant] may make out a prima facie case of purposeful discrimination by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose." Washington v. Davis, [426 U.S.] at 239-242:"

> Once the defendant makes the requisite showing, the burden shifts to the State to explain

> adequately the racial exclusion. Alexander v. Louisiana, 405 U.S. [625], at 632 [(1972)]. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their duties. See Alexander v. Louisiana, supra, at 632; Jones v. Georgia, 389 U.S. 24, 25 (1967). Rather the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the . . . result."

90 L.Ed.2d 85-86.

The approach is "a traditional feature of the common law," Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255 n.8, which, in the context of discrimination litigation, requires a complainant to "eliminate[] the most common nondiscriminatory reasons for the [observed facts]," id. at 254, and then places a burden on the alleged wrongdoer to show "a legitimate reason for" those facts, id. at 255, thereby "progressively . . . sharpen[ing] the inquiry into the elusive factual

question of intentional discrimination." Id. at 255 n.8.[15]

Although the initial showing of race-based state action required depends upon the nature of the claim and the responsibilities of the state actors involved, Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring), Castaneda v. Partida, 430 U.S. 482, 494-95 (1977); cf. Wayte v. United States, __U.S.__, 84 L.Ed.2d 547, 556 n.10 (1985), the guiding principle is that courts must make "a sensitive inquiry into such circumstantial and direct

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[15]The roots of this approach run back at least as far as Neal v. Delaware, 103 U.S. 370 (1881), where the Court refused to indulge a "violent presumption," offered by the State of Delaware to excuse the absence of black jurors, that "the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity to sit on juries." 103 U.S. at 397. Absent proof to support its contention, the State's unsupported assertion was held insufficient to rebut the prisoner's prima facie case. Id.

evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Accord, Rogers v. Lodge, 458 U.S. 613, 618 (1982). Among the most important factors identified by the Court as probative have been (i) the racial impact of the challenged action, (ii) the existence of a system affording substantial state discretion, and (iii) a history of prior discrimination.

(ii) Petitioner's Evidence

The prima facie case presented by petitioner exceeds every standard ever announced by this Court for proof of discrimination under the Equal Protection Clause. The centerpiece of the case, although not its only feature, is the work of Professor Baldus and his colleagues, who have examined in remarkable detail the workings of

Georgia's capital statutes during the first seven years of their administration, from 1973 through 1979. The Baldus studies are part of a body of scientific research conducted both before and after Furman that has consistently reported racial discrimination at work in Georgia's capital sentencing system.[16] Baldus's research reached the same conclusions as the earlier studies, but there the resemblance ends: his work is vastly more detailed and comprehensive than any

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16 See, Wolfgang & Riedel, Race, Judicial Discretion and the Death Penalty, 407 Annals 119 (1973); Wolfgang & Riedel, Race, Rape and the Death Penalty in Georgia, 45 Am. J. Orthopsychiat. 658 (1975); Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980); Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984); Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985).

prior sentencing study in Georgia or elsewhere.

The Baldus research actually comprised two overlapping studies: the first, a more limited examination of cases from 1973-1978 in which a murder conviction had been obtained at trial (Fed.Tr.170); the second, a wide-ranging study involving a sample of all cases from 1973 through 1979 in which defendants indicted for murder or voluntary manslaughter had been convicted and sentenced to prison. (Id. 263-65). Most of Baldus' findings in this case are reported from the second study.

a. The Racial Disparities

"The impact of the official action -- whether it 'bears more heavily on one race than another' . . . -- provide[s] an important starting point." Arlington Heights, 429 U.S. at 266. Here, the

Baldus studies reveal substantial, unadjusted racial disparities: a death-sentencing rate nearly eleven times higher in white-victim cases than in black-victim cases. (Fed.Tr.730-33; S.E. 46). Professor Baldus testified that these figures standing alone did not form the basis for his analysis, because they offered no control for potential legitimate explanations of the observed racial differences. (Fed. Tr. 734). Professor Baldus thus began collecting data on every non-racial factor suggested as relevant by the literature, the case law, or actors in the criminal justice system. His final questionnaires sought information on over 500 items related to each case studied. (Fed.Tr.278-92; S.E. 1-42).

After collecting this vast storehouse of data, Professor Baldus and his colleagues conducted an exhaustive

series of analyses, involving the application of increasingly sophisticated statistical tools to scores of sentencing models. The great virtue of the Baldus work was the richness of his data sources and the extraordinary thoroughness of his analysis. Throughout this research, Baldus and his colleagues forthrightly tested many alternative hypotheses and combinations of factors, in order to determine whether the initial observed racial disparities would diminish or disappear. (Fed.Tr.1082-83). Far from concealing their results from scrutiny, they exposed them to open and repeated inquiry by others, soliciting from the State and obtaining from the federal judge in this case an additional "sentencing model" which they then tested and reported. (Fed.Tr.810; 1426; 1475-76)(R. 731-52).

The results of these analyses were uniform. Race-of-victim disparities not only persisted in analysis after analysis -- at high levels of statistical significance -- but the race of the victim proved to be among the more influential determiners of capital sentencing in Georgia. Professors Baldus and Woodworth indicated that their most explanatory model of the Georgia system, which controlled for 39 legitimate factors, revealed that, on average, the murderers of white victims faced odds of a death sentence over 4.3 times greater than those similarly situated whose victims were black. (See DB 82). Moreover, black defendants like petitioner McCleskey whose victims were white were especially likely to receive death sentences.

b. The Opportunity for Discretion

The strong racial disparities shown

by Professor Baldus arise in a system affording state actors extremely broad discretion, one unusually "susceptible of abuse." Castaneda v. Partida, 430 U.S. at 494. The existence of discretion is relevant because of "the opportunity for discrimination [it] . . . present[s] the State, if so minded, to discriminate without ready detection." Whitus v. Georgia, 385 U.S. at 552. The combination of strong racial disparities and a system characterized by ample State discretion has historically prompted the closest judicial scrutiny. See, e.g., Yick Wo v. Hopkins, 118 U.S. at 373-74.

Post-Furman capital sentencing systems in general are characterized by a broad "range of discretion entrusted to a jury," which affords "a unique opportunity for racial prejudice to operate but remain undetected." Turner

v. Murray, 90 L.Ed. 2d at 35. The Georgia system is particularly susceptible to such influences, since Georgia: (i) has only one degree of murder, Gregg v. Georgia, 428 U.S. 153, 196 (1976); (ii) permits a prosecutor to accept a plea to a lesser offense, or to decline to submit a convicted murder case to a sentencing jury, even if statutory aggravating circumstances exist, id. at 199; (iii) includes several statutory aggravating circumstances that are potentially vague and overbroad, id. at 200-02 (at least one of which has in fact been applied overbroadly, Godfrey v. Georgia, 446 U.S. 420 (1980)); and (iv) allows a Georgia jury "an absolute discretion" in imposing sentence, unchecked by any facts or legal principles, once a single aggravating circumstance has been found. Zant v. Stephens, 462 U.S. 862, 871

(1983).

Petitioner presented specific evidence which strongly corroborated this general picture. The District Attorney for Fulton County, where petitioner was tried, acknowledged that capital cases in his jurisdiction were handled by a dozen or more assistants. (Dep. 15, 45-48). The office had no written or oral policies or guidelines to determine whether a capital case would be plea-bargained or brought to trial, or whether a case would move to a sentencing proceeding upon conviction. (Dep. 12-14, 20-22, 28, 34-38). The District Attorney admitted that his office did not always seek a sentencing trial even when substantial evidence of aggravating circumstances existed. (Dep. 38-39). Indeed, he acknowledged that the process in his office for deciding whether to seek a death sentence was

"probably . . . the same" as it had been in the pre-Furman period. (Dep. 59-61). These highly informal procedures are typical in other Georgia jurisdictions as well. See Bentele, The Death Penalty in Georgia: Still Arbitrary, 61 Wash. U. L.Q. 573, 609-21 (1985)(examining charging and sentencing practices among Georgia prosecutors in the post-Furman period).[17]

c. The History of Discrimination

Finally, "the historical background" of the State action under challenge "is

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[17] This evidence is sufficient to overcome the constitutional presumption "that prosecutors will be motivated in their charging decisions [only by] . . . the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." Gregg v. Georgia, 428 U.S. at 225. Professor Baldus performed a number of analyses on prosecutorial charging decisions, both statewide (Fed.Tr.897-910; S.E. 56-57), and in Fulton County (Fed.Tr.978-81; S.E. 59-60), which demonstrate racial disparities in prosecutorial plea-bargaining practices.

one evidentiary source." Arlington Heights, 429 U.S. at 267. See generally Hunter v. Underwood, __U.S.__, 85 L.Ed.2d 222 (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Petitioner supplemented his strong statistical case with references to the abundant history of racial discrimination that has plagued Georgia's past. Some of that history has been set forth in the petition for certiorari, and it will not be reviewed in detail in this brief.

It suffices to note here that, for over a century, Georgia possessed a formal, dual system of crimes and penalties, which explicitly varied by the race of the defendant and that of the victim. (See Pet. for Certiorari, 3-4). When de jure discrimination in Georgia's criminal law ended after the Civil War, it was quickly replaced by a social system involving strict de jure

segregation of most areas of public life, with consequent rampant de facto discrimination against blacks in the criminal justice system.[18] (Id., 8-11). This Court and the lower federal courts have been compelled repeatedly to intervene in that system well into this century to enforce the basic constitutional rights of black citizens. (See cases cited in Pet. for Certiorari, 10n.18. Unfortunately, the State's persistent racial bias has extended to the administration of its capital statutes as well.

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In sum, petitioner presented the District Court with evidence of

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[18] As a Georgia court held in 1907: "[E]quality [between black and white citizens] does not, in fact, exist, and never can. The God of nature made it otherwise and no human law can produce it and no tribunal enforce it." Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, 58 S.E. 899, 903 (1907).

substantial racial discrimination in Georgia's capital sentencing system, after controlling for hundreds of non-racial variables. He noted that this highly discretionary system was open to possible abuse, and he recited a long and tragic history of prior discrimination tainting the criminal justice system in general and the administration of capital punishment in particular. Nothing more should have been necessary to establish a prima facie case under this Court's settled precedents.

(iii) The Opinion Below

A majority of the Court of Appeals found petitioner's evidentiary showing to be "insufficient to either require or support a decision for petitioner." (J.A.246). The court in effect announced the abolition of the prima facie standard, and required instead

that petitioner produce evidence "so great that it compels a conclusion that the system is . . . arbitrary and capricious," (J.A.258) and "so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." (J.A.250). Petitioner failed this test, the court concluded, in part because his studies failed to take account of "'countless racially neutral variables,'" including

> looks, age, personality, education, profession, job, clothes, demeanor and remorse, just to name a few . . There are, in fact, no exact duplicates in capital crimes and capital defendants.

(J.A.271-272).

To meet the lower court's standard of proof, in other words, would have required petitioner to anticipate and control for factors the court frankly acknowledged to be "countless." Such a

standard seems squarely, irretrievably at odds with the whole notion of a prima facie case. If a petitioner's evidence must "compel a conclusion" of discriminatory intent -- if it must anticipate and dispel every conceivable non-racial explanation --then the so-called "prima facie" case is logically irrebuttable and required to be so. This insatiable demand for unspecified information is precisely what the Court condemned as error last Term in Bazemore v. Friday, 106 S.Ct. at 3009. (petitioner's' evidence need "not include 'all measurable variables thought to have an effect on [the matter at issue]"). It is no less error in this case.

B. The Court of Appeals Disregarded This Court's Teachings On The Proper Role Of Statistical Evidence In Proving Intentional Discrimination

(i) The Controlling Precedents

Closely related to its repudiation

of the prima facie principle was the Court of Appeals' disparagement of statistical proof. Once again, the court's opinion clashed sharply with the pronouncements of this Court. "[O]ur cases make it unmistakably clear," Justice Stewart wrote in Teamsters v. United States, 431 U.S. 324, 339 (1977), "that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977). See, e.g. Castaneda v. Partida, 430 U.S. 482, 493-96 (1977). The statistical method chiefly relied upon by petitioner

McCleskey -- multiple regression analysis -- was specifically discussed with approval by the Court in Bazemore v. Friday, 96 S.Ct. at 3009, and has received wide acceptance in the lower courts. [19]

(ii) Petitioner's Evidence

In the District Court, Professors Baldus and Woodworth explained in painstaking detail every major methodological issue they faced, how they addressed the issue, and how it

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[19] See, e.g., Wilkins v. University of Houston, 654 F.2d 388, 402-03 (5th Cir. 1981), vacated and remanded on other grounds, 459 U.S. 809 (1982); EEOC v. Ball Corp., 661 F.2d 531 (6th Cir. 1981); Coble v. Hot Springs School District No. 6, 682 F.2d 721,731-32 (8th Cir. 1982); Eastland v. TVA, 704 F.2d 613 (11th Cir. 1983); Segar v. Smith, 738 F.2d at 1261, 1278-79; Vuyanich v. Republic Nat'l Bank, supra. See generally Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L. Rev. 737 (1980); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702 (1980).

affected their findings. See, e.g., Fed. Tr. 683; 704-05; 713; 783; 820; 917-18; 1222-24; 1279-82). In virtually every instance of significance, they conducted their analysis by alternative methods, and demonstrated that the choice of methods made no difference in the racial disparities.

The Baldus studies drew accolades from Dr. Richard Berk, who evaluated their quality and soundness in light of his prior comprehensive review of sentencing research as a member of a National Academy of Sciences panel:

> [Baldus' studies] ha[ve] very high credibility, especially compared to the studies that [the National Academy of Sciences] . . . reviewed. We reviewed hundreds of studies on sentencing . . . and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's ever been done. I mean there's nothing even close.

(Fed.Tr.1766).

Baldus and Woodworth conducted analyses with simple cross-tabular methods and with complex multivariate methods. (Tr. 122-28; S.E. 47-49). They used "weighted" and "unweighted" data. (Fed.Tr.621-26; S.E. 68-69). They used multiple regression models employing enormously large numbers of variables (230 or more) (Fed.Tr.802-04; S.E 51), and they used medium-sized and small models as well. (Fed.Tr.773-92; S.E. 58). Professor Baldus selected variables by employing his legal and professional expertise concerning the factors most likely to influence capital sentencing decisions. (Tr. 808-09). Then he permitted a computer to refine his selection by the use of "stepwise" regressions and other objective statistical means. (Fed.Tr.821-23).

Professors Baldus and Woodworth conducted analyses on the variables as

coded; then, when the State challenged those particular coding values, they recoded the variables and ran the analyses again. (Fed.Tr.1677-1700). They employed acceptable statistical conventions to "impute" values in the small number of cases where some data were actually missing (Fed.Tr.1101-02), but they also performed "worst-case" analyses in which they adopted assumptions most contrary to their theories and re-ran their analyses under such assumptions. (Fed.Tr.1101; 1701-07; S.E. 64-67).

Dr. George Woodworth, petitioner's statistical expert, testified to the appropriateness of the major statistical conventions used in the studies. (Fed.Tr.1265). He also testified about a series of "diagnostic" analyses he conducted to verify the statistical appropriateness of each procedure

selected.[20] (Fed.Tr.1251-65).

Finally, indulging professional skepticism even as to the use of statistical methods, Professor Baldus conducted additional non-statistical, "qualitative" analyses in which he evaluated (a) all post-Furman Georgia cases with the "(b)(2)" or "contemporaneous felony" aggravating circumstance (see DB 86); (b) all capital cases arising in Fulton County (Fed.Tr.842-45; see DB 109); and (c) all Fulton County cases involving police officer victims. (Fed.Tr.1051-55; S.E. 61-63). He evaluated those cases through recognized scientific means, comparing the qualitative features and facts of each case to ascertain whether racial factors continued to play a

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[20] Dr. Richard Berk confirmed during his testimony that the methods employed by Baldus and Woodworth were statistically appropriate. (Fed. Tr. 1766; 1784-86).

role. They did. (Fed.Tr.864-65; 993; 1055-56).

It is difficult to imagine a more wide-ranging and searching series of statistical and non-statistical analyses. The results were not only internally consistent; they were essentially consistent with all other research that has been conducted on Georgia's post-Furman capital system.

(iii) The Opinion Below

The Court of Appeals treated statistical evidence as going to two distinct points, and ended by dismissing its utility for either purpose. The majority first held that statistical studies can never prove discrimination against an individual defendant.[21] This

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[21] The Court of Appeals states this proposition in varying forms: "[G]eneralized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death." (J.A.260). "No single petitioner could,

thesis appears to rest in part upon the unobjectionable premise that statistics, dealing as they do with probabilities and averages, cannot purport to speak directly to the events in any particular case. Where it goes wrong is in denying that specific events can and often must be proved indirectly, by inferences drawn from probabilities.[22] It is unclear why the majority was unwilling to permit recourse to ordinary fact-finding procedures for proof of of racially discrimination in capital sentencing. It may be unwarranted skepticism regarding the probative power

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on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white." (J.A.267). "The statistics alone are insufficient to show that McCleskey's sentence was determined by the race of his victim, or even that the race of his victim contributed to the imposition of the penalty in his case." (J.A.270).

[22] Cf. Fed. Rule Evid. 406.

of statistics "[w]here intent and motivation must be proved." (J.A.250). Cf. Castaneda v. Partida, 430 U.S. at 495-97 & n.17 (finding statistical evidence sufficient to make out a prima facie case of intentional racial discrimination). Or it may reflect the improvident burden of proof announced by the Court of Appeals in capital cases, under which a condemned inmate must present evidence "so strong as to permit no inference other than that . . . of a racially discriminatory intent or purpose" (J.A.250). Either way, the result is incorrect and reversible. For the proper rule, of course, is that "as long as the court may fairly conclude, in the light of all the evidence, that it is more likely than not that impermissible discrimination exists, the [claimant] . . . is entitled to prevail." Bazemore v. Friday, 106

S.Ct.at 3009.

The Court of Appeals took a somewhat different tack regarding the bearing of statistical evidence on the second issue it perceived -- whether there was discrimination in "the system" as distinguished from discrimination aimed at "a particular defendant." (J.A.260). The majority tacitly conceded, as precedent requires, that statistical evidence might suffice in principle to compel an inference of system-wide discrimination.[23] (J.A.260-61). Yet the Court immediately faulted any

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[23] "[D]iscriminatory impact . . . may for all practical purposes demonstrate unconstitutionality [where] . . . the discrimination is very difficult to explain on nonracial grounds." Washington v. Davis, 426 U.S. at 242. Accord: Batson v. Kentucky, 90 L.Ed.2d at 85. See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 275 (1979) ("[i]f the impact of this statute could not plausibly be explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral.")

systemwide statistical study that did not take into account "every possible factor," e.g., each of the "'countless racially neutral variables'" that it hypothesized must exist. (J.A.261). It faulted even Professor Baldus's largest statistical models for this failure, and concluded that "[t]he type of research submitted here . . . is of restricted use in showing what undirected factors control" Georgia's capital sentencing system. (J.A.272).

A prima facie statistical case has never been supposed to require the anticipatory negation of "every possible factor" that might explain away an apparent pattern of discrimination. Accounting for "the most common nondiscriminatory" factors is sufficient. Texas Dept't of Community Affairs v. Burdine, 450 U.S. at 254; see, e.g., Bazemore v. Friday, 106 S.Ct.

at 3009. Here, petitioner not only demonstrated substantial racial disparities; he then voluntarily assumed, and amply met, the burden of discounting every plausible non-racial explanation ever suggested. At that point, if not earlier, he met his prima facie burden.[24]

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[24] Having done so, "'[i]f there [was] . . . a "vacuum" it [was] . . . one which the State [had to] . . . fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination.'" Turner v. Fouche, 396 U.S. at 361, quoting Avery v. Georgia, 345 U.S. 559, 562 (1953). See also Patton v. Mississippi, 332 U.S. 463, 468-69 (1947). To do so, the State was obligated to "make a 'clear and reasonably specific showing,' based on admissible evidence, that [an] alleged nondiscriminatory explanation in fact explains the disparity." Segar v. Smith, 738 F.2d at 1268, quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253-55. The State of Georgia never identified such a factor, much less made a "clear and reasonably specific showing" of its impact on Georgia's racial disparities.

C. The Court Of Appeals Erroneously Held That Even Proven Patterns Of Racial Discrimination Will Not Violate The Constitution Unless Racial Disparities Are Of Large Magnitude

The Court of Appeals committed two egregious errors -- one legal and the other factual -- in its treatment of petitioner's racial results. First, it held that the Equal Protection Clause prohibits discriminatory state conduct only if such conduct is of "substantial" magnitude. Secondly, it found petitioner's racial disparities to be "marginal."

Yet the Fourteenth Amendment prohibits every instance of state-sanctioned discrimination, irrespective of its magnitude. And petitioner's racial findings are in fact quite substantial in magnitude: race ranks among the factors, whether legitimate or illegitimate, that exert the largest influence on Georgia's capital

sentencing system.

(i) The Controlling Precedent

The Equal Protection Clause does not admit of partial performance. A State engaged in discrimination on the basis of race must cease its unconstitutional conduct altogether. This principle was confirmed last Term in Papasan v. Allain, supra. Responding to an argument that the Equal Protection Clause was not implicated in that case because school funds at issue there were "'an insignificant part of the total payments from all sources made to Mississippi's school districts,'" 106 S.Ct. at 2951-53, the Court expressly "decline[d] to append to the general requirements of an equal protection cause of action an additional threshold effects requirement." Id. at 2946 n.17.

The same principle emerges inferentially from Bazemore v. Friday,

which involved a dispute over a disparity of $331 in the average yearly wages of black and white employees--less than 3% of the wage for white workers. The lesson of Bazemore is plain: if blacks prove that they regularly receive only 95 cents on the dollar from a State agency, the State cannot defend on the ground that a nickel is de minimus.[25]

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[25] The Court's jury discrimination cases are no exception to this rule. The Court's tolerance of minor differentials in racial representation between the jury-eligible populations and the representation on grand or petit jury lists reflects not constitutional indifference toward small acts of discrimination, but a recognition of the statistical properties of random selection: small differences can sometimes be attributed to chance. See Castaneda v. Partida, 430 U.S. at 496 n.17. "The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident . . . ." Id. at 494 n.13. In this case that problem is absent. Petitioner has amply proven that the racial disparities found here are statistically significant and were not chance findings.

(ii) **Petitioner's Evidence**

The extraordinary array of alternative analyses conducted by Professor Baldus yielded, naturally enough, an extraordinary array of statistical and nonstatistical results-- virtually all showing racial disparities. Professor Baldus testified that the most meaningful summary indicators of the magnitude of the racial factors found were the "death odds-multipliers" that he calculated using logistic regression analysis, a particularly appropriate statistical method for the data at issue in this case since the overall rate of death sentencing is quite low. (See Fed. Tr. 1230-34). The odds-multiplier for the race-of-victim factor under the best statistical model was 4.3, meaning that, on average, a Georgia defendant's odds of receiving a death sentence were 4.3

times greater if his victim was white than if the victim was black. As Professor Gross has observed:

> It might be useful . . . to put these numbers in perspective. Coronary heart disease, it is well known, is associated with cigarette smoking. But what is the magnitude of the effect? . . .[C]ontrolling for age, smokers were 1.7 times more likely to die of coronary artery disease than nonsmokers. . . .[s]moking cigarettes increases the risk of death from heart disease greatly, but by a considerably smaller amount than the race-of-victim effect that the Eleventh Circuit dismisses as marginal.[26]

The Tables and Figures in the Supplemental Exhibits are exemplary of additional evidence presented in the District Court on the magnitude of the racial disparity. One of Professor Baldus' most important findings was that the impact of the racial factors varies

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[26]Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C. Davis L. Rev. 1275, 1307 (1985).

with the seriousness of the cases:

> Race is a factor in the system only where there is room for discretion, that is, where the decision maker has a viable choice. In a large number of cases, race has no effect. These are the cases where the facts are so mitigated the death penalty is not even considered as a possible punishment. At the other end of the spectrum are the tremendously aggravated murder cases where the defendant will very probably receive the death penalty, regardless of his race or the race of the victim. In between is the mid-range of cases where there is an approximately 20% racial disparity.

(J.A.315) (Clark, J., dissenting in part.) Professor Baldus prepared two tables, employing an "index method," that demonstrate this impact among more than 450 of the most aggravated Georgia cases. (Fed.Tr.880-83). In the tables, one of which appears in the Supplemental Exhibits at 54, the cases were arrayed into eight groups according to their level of seriousness, with the least aggravated cases in group 1 and the most

aggravated in group 8. The death-sentencing rates were then calculated and reported for each group. In the first two groups, no one was sentenced to death and consequently no racial disparities appear. Once death sentences begin to be imposed, however, in groups 3 through 8, a gap quickly opens between the death-sentencing rates in white-victim cases and in black-victim cases, with the white-victim cases showing a consistently higher incidence of capital sentences. [27] A similar pattern of

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[27] Dr. Woodworth constructed a number of figures to capture this pattern visually. One of them, GW 8, appears in the Supplemental Exhibits at page 72. In GW 8, the horizontal axis moving toward the right reflects increasingly more aggravated groups of cases. The vertical line represents the percentage increase in the likelihood of a death sentence. As GW 8 makes clear, once cases become sufficiently aggravated so that juries begin imposing death sentences, the death-sentencing rate rises more sharply among white-victim cases than among black-victim cases. Thus, at any particular level of aggravation (until the two bands finally

disparities measured by race of the defendant among all white-victim cases, is reflected in DB 91 (Fed.Tr.885-86). Professor Baldus observed:

> [W]hen you look at the cases in . . . the mid-range, where the facts do not call clearly for one choice or another, that's where you see there's room for the exercise of discretion . . . the facts liberate the decision maker to have a broader freedom for the exercise of discretion, and it is in the context of those decisions that you see the effects of . . . arbitrary or possibly impermissible factors.

(Fed.Tr.844). [28]

Dr. Woodworth testified without contradiction that petitioner McCleskey's own crime fell into the

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converge at the upper levels of aggravation), a significantly higher percentage of white-victim cases receive death sentences.

[28] These findings support the "liberation hypothesis" advanced by Professors Harry Kalven and Hans Zeisel in their influential work, The American Jury 164-67 (1966). See generally Ballew v. Georgia, 435 U.S. 223, 237-38 (1978).

middle of the midrange of moderately aggravated cases. After reviewing the results of three separate statistical techniques, Dr. Woodworth concluded:

> [A]t Mr. McCleskey's level of aggravation the average white victim case has approximately a twenty [20] percentage point higher risk of receiving the death sentence than a similarly situated black victim case.

(Fed.Tr.1740).

However, Professor Baldus also testified concerning the <u>average</u> impact of the racial factors across <u>all</u> of the cases. The Court of Appeals focused upon one regression coefficient[29]

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[29] The regression coefficient, as petitioner's experts explained, measures the average effect of a particular factor on the outcome of a multiple regression analysis, after controlling for the cumulative impact of all of the other factors considered. For example, a coefficient of .06 for the race-of-victim factor in a multiple regression analysis measuring the death-sentence outcome means that, independently of every other factor considered, the race of the victim would increase the average likelihood of a death sentence by six percentage points. (Fed. Tr. 691-94).

reported in DB 83, which was derived from an analysis employing a 230-variable model. That coefficient, .06, indicates that when the race of the victim was white, the probability of a death sentence increased by 6-in-100.

Petitioner offered additional evidence, some of it statistical and some non-statistical, to identify more precisely the likely impact of Georgia's pervasive racial disparities on petitioner McCleskey's case. First, Baldus reported upon his analysis of data from Fulton County, where petitioner was tried. He testified that his performance of progressively more sophisticated analyses for Fulton

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The number in parentheses in DB 83 under the .06 coefficient "(.02)" reflects the statistical significance of the coefficient. It indicates that the likelihood that this result would have occurred by chance if no racial disparities in fact existed is less than 2 per cent.

County, similar to those he had employed statewide, "show a clear pattern of race of victim disparities in death sentencing rates among the cases which our analyses suggested were death eligible." (Fed.Tr.983; 1043-44).

To supplement this statistical picture, Baldus examined a "cohort" of 17 Fulton County defendants arrested and charged, as was petitioner, with homicide of a police officer during the 1973-1979 period. Only two among the seventeen, Baldus found, even faced a penalty trial. One, whose police victim was black, received a life sentence. (Fed.Tr.1050-62; S.E. 61-63). Petitioner, whose police victim was white, received a death sentence. Although the small numbers require caution, "the principal conclusion that one is left with," Baldus testified, "is that . . . this death sentence that was

imposed in McCleskey's case is not consistent with the disposition of cases involving police officer victims in this county." (Fed.Tr.1056).

Professor Baldus devised one additional measure of the magnitude of the influence of the racial factors. He first computed the regression coefficients for those factors and for other important aggravating and mitigating factors. Then he rank-ordered them. As DB 81 demonstrates (S.E. 50), the race of the victim in Georgia exerts as much influence on the sentence outcome as whether the defendant had a prior murder conviction. It is more important in determining life or death than the fact that the defendant was the prime mover in the homicide, or that he admitted guilt and asserted no defense. This measurement reveals the power of race at work in the

Georgia death penalty system. Quite simply: its effects are of the same magnitude as those of statutory aggravating factors identified by the Georgia legislature as "prerequisite[s] to the imposition of the death penalty." Gregg v. Georgia, 428 U.S. at 198.

(iii) The Opinion Below

The Court of Appeals centered its attention on two statistics drawn from the Baldus studies: (i) the 6 percentage point average disparity in death-sentencing rates between all white-victim and all black-victim homicide cases; and (ii) the corresponding 20 percentage point disparity within the subgroup of moderately aggravated cases that included petitioner McCleskey's.

Toward the six percentage point figure, the court displayed equal measures of incomprehension, skepticism

and toleration. The court's incomprehension is reflected in its repeated characterization of the significance of the figure as "marginal" (J.A.273) or "insufficient." (J.A.268). This is a serious error. As one commentator has noted, although

> [i]t sounds right when the court describes the '6% disparity' found by Baldus as a 'marginal difference [i]n fact it is nothing of the sort. Although the court seems to have missed the point entirely, this disparity actually means that defendants in white-victim cases are several times more likely to receive death sentences than defendants in black-victim cases.

Gross, supra, 18 U.C. Davis L. Rev. at 1298. What the court apparently did not appreciate is (a) that this figure represents an average race-of-victim disparity of 6 percentage points, not 6 percent, and (b) that the 6 percentage point average disparity occurs across an entire system in which overall death-

sentencing rates are only five per cent. (See Fed. Tr. 634; S.E. 45). Consequently, if the death-sentencing rate among a given group of black-victim cases were 6 percent, the rate for comparable white-victim cases would be 12 percent, a 100% increase. However, since the 6 percentage point disparity is an average effect, it is more relevant to compare it to the average .01 death sentence rate among all black victim cases (S.E. 47), which it exceeds by a factor of 6 (.06/.01), a 600% increase over the black-victim rate. It is obviously a gross mistake to view this difference as a "marginal" one. Cf. Hunter v. Underwood, __U.S.__, 85 L.Ed.2d 222, 228-30 (1985)(striking down a statute which disqualified blacks from voting at 1.7 times the rate of whites).

The court's admixture of skepticism is reflected in its remarks that "[n]one

of the figures mentioned above is a definitive quantification of the victim's race in the overall likelihood of the death penalty in a given case" (J.A.266), and that this evidence proves only that "the reasons for a [racial] difference . . . are not so clear in a small percentage of the cases." (J.A.273). In other words, the court regarded the .06 figure as little more than a statistical aberration. However, this interpretation cannot be squared with the unrebutted evidence that the figure in question -- which, it bears repeating, means that those who kill white victims in Georgia are <u>several times</u> more likely to be sentenced to death than are similarly situated murderers of black victims on the average -- is a highly reliable figure, statistically significant at the $p<.02$ level after controlling for literally

hundreds of rival hypotheses. It will not be blinked away.

The court's toleration of whatever disparity does exist comprises the greatest portion of its opinion:

> Taking the 6% bottom line revealed in the Baldus figures as true, this figure is not sufficient to overcome the presumption that the statute is operating in a constitutional manner. In any discretionary system, some imprecision must be tolerated, and the Baldus study is simply insufficient to support a ruling, in the context of a statute that is operating much as intended, that racial factors are playing a role in the outcome sufficient to render the system as a whole arbitrary and capricious.

(J.A.268).

The Court bolstered its judgment by citing three decisions of this Court on applications for stays in capital cases.[30] It reasoned that since the

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[30] Wainwright v. Ford, 467 U.S. 1220 (1984); Wainwright v. Adams, 466 U.S. 964 (1984); Sullivan v. Wainwright, 464 U.S. 109 (1983).

petitioners in those cases had all proffered other studies in which "[t]he bottom line figure [included] . . . a 'death-odds multiplier' of about 4.8 to 1" (J.A.268), and since "Baldus obtained a death-odds multiplier of 4.3 to 1 in Georgia," a rejection of the Baldus studies "is supported, and possibly even compelled, by" the disposition of these stay applications. "[I]t is reasonable to suppose that the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim." (J.A.269).

Yet as this Court well knows, the Florida study involved in those three applications was significantly less comprehensive and sophisticated than the Baldus studies. The Court of Appeals overlooks (i) that none of this Court's summary orders ever addressed the

magnitude of the disparities shown in the Florida studies; (ii) that this Court's orders respecting applications for stays of execution "may not be taken . . . as a statement . . . on the merits," Graves v. Barnes, 405 U.S. 1201, 1204 (1972)(Powell, J., in chambers); accord, Alabama v. Evans, 461 U.S. 230, 236 n.* (1983)(Marshall, J., dissenting), and (iii) that under the constitutional principles outlined earlier, racial discrimination of any magnitude is unconstitutional.

When the Court of Appeals turned to the 20 percentage point statistic--representing the average racial disparity among cases similar in aggravation level to petitioner's -- the majority apparently became uncomfortable with any approach that treated such a figure as marginal. Instead, it felt compelled to dispense with its earlier

assumption (J.A.246) that the Baldus studies were valid. In a factual attack, the court complained that the figures were not adequately explained and that they were not shown to be statistically significant. (J.A.269-70). On both points the court ignored the record. Petitioner's experts carefully explained the basis of their calculations (Fed.Tr.1738-40), the importance of the numbers, the rationale of the "midrange" categories (id. 881-86; 1291-1300), and the statistical significance of each contributing figure. (Id. 1734-40; S.E. 50,54,68).

In sum, there is no constitutional warrant for the federal courts to overlook proven racial discrimination--especially in capital sentencing--merely because its impact is dubbed "marginal." Yet even if such a notion were permissible, petitioner has

adequately demonstrated that powerful, biasing forces are at work shaping Georgia's death-sentencing system in a racially discriminatory pattern, and that he is among those defendants most severely affected by the invidious forces.

D. The Court Of Appeals Erred in Demanding Proof of "Specific Intent To Discriminate" As A Necessary Element Of An Eighth Amendment Claim

(i) The Controlling Precedents

The primary concern of the Court's Eighth Amendment cases has always been with the results of the sentencing process: capital punishment is cruel and unusual if "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (1972)(White, J., concurring). Justice Stewart resolved Furman after "put[ting]. . . to one side" the issue

of intentional discrimination. Id. at 310. Justice Douglas similarly disavowed that the "task . . . to divine what motives impelled these death penalties." Id. at 253. No member of the Furman majority stated or hinted that proof of invidious intent had been necessary to his decision.

In its subsequent opinions, the Court has stressed that the ultimate aim of the Eighth Amendment is to "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. at 189. Such arbitrariness can afflict a system irrespective of conscious choice by specific actors, and it is the State which bears the "constitutional responsibility to tailor and apply its law in a manner that avoids" this outcome. Godfrey v. Georgia, 446 U.S. at 428; Eddings v. Oklahoma, 455 U.S. 104, 118

(1982)(O'Connor, J., concurring); Gardner v. Florida, 430 U.S. 349, 357-58 (1977). These rulings in capital cases are consistent with the law of the Eighth Amendment in other contexts, where the constitutional touchstone has long been effects, not intentions. See Rhodes v. Chapman, 452 U.S. 337, 364 (1981)(Brennan, J., concurring). See also id. at 345-46 (plurality opinion); Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979); Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972).

The evil identified in Furman, the evil which the Eighth Amendment seeks to prevent, is the unequal treatment of equals in the most extreme sentencing decision our society can make. Gardner v. Florida, 430 U.S. at 361. Considerations of race are legally irrelevant to that decision; their systematic influence produces, by

definition, a pattern of sentencing that is legally "arbitrary and capricious." See generally, B. Nakell & K. Hardy, The Arbitrariness of the Death Penalty (1986)(forthcoming). The task of identifying precisely where and how, consciously or unconsciously, race is influencing the literally thousands of actors involved in capital sentencing--prosecutors, judges, jurors who assemble to make a single decision in a single case, only to be replaced by other jurors in the next case, and still others after them -- is virtually impossible. Yet "[t]he inability to identify the actor or the agency has little to do with the constitutionality of the system." (J.A.314) (Hatchett, J., dissenting in part and concurring in part).

(ii) Petitioner's Evidence

Whatever disagreements may surround

the issue of intent, there is no room for dispute on the question of impact. Georgia's gross racial disparities are stark: white victim cases are nearly eleven times more likely to result in a death sentence than black victim cases. As we have shown, even under the most searching statistical analyses, this disproportionate racial impact remains substantial and highly statistically significant. The State has never refuted these results.

(iii) The Opinion Below

The Court of Appeals held that "purposeful discrimination" is an element of an Eighth Amendment challenge to the arbitrary administration of a capital statute, at least where the challenge is based in part upon proof of racial disparities. (J.A.258). The court acknowledged that "cruel and unusual punishment cases do not normally focus

on the intent of the government actor." Id. Yet it announced that

> where racial discrimination is claimed, not on the basis of procedural faults or flaws in the structure of the law, but on the basis of the decisions made within that process, then purpose, intent and motive are a natural component of the proof that discrimination actually occurred.

(J.A.257).

This opinion is plainly an exercise in ipse dixit reasoning. If "discrimination" in this passage means "intentional discrimination of the sort that violates the Equal Protection Clause," then the court fails to account for what the Eighth Amendment adds to the Fourteenth. If "discrimination" is synonymous with "racial disparity" -- the actual basis of petitioner's Eighth Amendment claim-- then even the court's linguistic logic evaporates completely. In any event, the majority below fails to address

either the contrary holdings of this Court or the policies that lie behind the Eighth Amendment cases. It supplies no justification for singling out race bias -- alone among all arbitrary factors that might affect a capital sentencing system -- and requiring that petitioner trace it back to an individual, consciously discriminating actor. "Identified or unidentified, the result of the unconstitutional ingredient of race . . . is the same." (J.A.314) (Hatchett, J., dissenting in part and concurring in part). And it remains the same whether the racial ingredient comes into play through wilful bigotry or through more subtle processes of race-based empathies, apprehensions and value judgments operating within the framework of a highly discretionary capital sentencing procedure. See Turner v. Murray, 90

L.Ed.2d at 35-36. However brought about, the result is nonetheless "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Gregg v. Georgia, 428 U.S. at 195 n.46.

III.

THE COURT SHOULD EITHER GRANT PETITIONER RELIEF OR REMAND THE CASE TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION UNDER APPROPRIATE LEGAL STANDARDS

In Skipper v. South Carolina, __U.S.__, 99 L.Ed. 2d 1, 13 n.2 (1986), Justice Powell observed in concurrence that "when some defendants are able to avoid execution based on irrelevant criteria, there is a far graver risk of injustice in executing others." The criterion of race -- that of a defendant or his victim -- is worse than "irrelevant": it is expressly forbidden by the Constitution. Yet petitioner's evidence indicates (a) that race has played a substantial role in determining

who will be executed and who will avoid execution in the State of Georgia, and (b) that petitioner stands among the group of defendants upon whom Georgia's burden of racial bias falls most heavily.

The Court of Appeals, accepting the validity of petitioner's evidentiary submission, held that it failed to meet his burden of proof under the Eighth and Fourteenth Amendments. We have shown that this holding was error, requiring reversal. Since the proof of racial discrimination on this record is overwhelming and stands unrebutted despite its plain sufficiency to shift the burden of rebuttal to the State, we believe that nothing more is needed to support a decision by this Court upholding the merits of petitioner's Eighth and Fourteenth Amendment claims. However, inasmuch as the Court of

Appeals pretermitted a review of the factual findings of the District Court (J.A.263), this Court may prefer instead to remand for further proceedings under appropriate constitutional standards. See, e.g., Bazemore v. Friday, 106 S.Ct. at 3010-11.

While not strictly necessary to any holding that directs a remand, the Court might wish to announce standards to guide the Court of Appeals in addressing those remedial questions presented by petitioner's constitutional claims. In our judgment, the available remedial options would be affected considerably by the Court's choice of constitutional theory. Although this choice is a matter of little immediate moment to the present petitioner, [31] the consequences

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[31] The sole remedial issue in this habeas corpus proceeding is whether a petitioner "is in custody in violation of the Constitution or laws . . . of the

for other death-sentenced inmates in the State of Georgia might vary significantly depending upon it.

Under the Eighth Amendment, for example, proof that a particular capital sentencing system is being administered in an arbitrary or capricious pattern would presumably require the invalidation of that system as a whole, or at least of all sentences imposed in the jurisdiction during the period covered by the proof. See Furman v. Georgia, supra. However, under the Fourteenth Amendment, the finding of an Equal Protection violation need not inevitably require a vacatur of all death sentences within the jurisdiction. In Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274 (1977), the Court reasoned that although an employee could

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United States," 28 U.S.C. § 2241(c)(3); thus the only relief sought or possible under any theory is individual relief.

not be discharged for the exercise of his protected First Amendment rights, an employer was entitled to "show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of" consideration of the impermissible factor. Id. at 287. In the capital sentencing context, an analogous approach, requiring proof by the State beyond a reasonable doubt, see Chapman v. California, 386 U.S. 18 (1967),[32] would allow a State, even if

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[32] Mt. Healthy expressly drew upon principles, developed in the context of the criminal law, "distinguish[ing] between a result caused by a constitutional violation and one not so caused." 429 U.S. at 286, citing Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. 471 (1963); Parker v. North Carolina, 397 U.S. 790 (1970). The Lyons line of cases is related to, though analytically distinct from, the Chapman "harmless error" line. The former holds that a constitutional violation may be disregarded if it did not in fact work any injury to a petitioner's substantive rights. Chapman permits a state to avoid a reversal by demonstrating beyond a reasonable doubt that, even if an

its statute had been applied in violation of the Equal Protection Clause, to prove that, because of the extreme aggravation of a particular homicide, a death sentence would have been imposed, irrespective of racial considerations. Although Georgia could not make such a showing against inmates like petitioner, whose case was in the "midrange" of aggravation, it might have a stronger argument against those inmates whose crimes were highly aggravated, since race is less likely to have influenced the sentencing outcomes in their cases.

Whatever constitutional or remedial analysis is adopted by the Court, petitioner Warren McCleskey has presented evidence that fully

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injury to defendant's rights occurred, it was so insubstantial that it did not contribute to the defendant's conviction or sentence.

establishes the merit of his claims. The sentence of death imposed upon him on October 12, 1978 by the Superior Court of Fulton County is invalid.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: August 21, 1985

Respectfully submitted,

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